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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 763-769

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC.,

Petitioner,

v.

GULF REFINING COMPANY OF LOUISIANA, GULF REFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, SHELL OIL COMPANY, INC., FREEPORT SULPHUR COMPANY, and ERNEST COCKRELL, GULF REFINING COMPANY OF LOUISIANA, ET AL.,

Respondents.

No. 770

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC.,

Petitioner,

v.

ERNEST COCKRELL, HIS CURATOR AD HOC, BRUCE NUNEZ, AND THEIR ATTORNEYS, S. W. PLAUCHE, AND THE LAW FIRM OF HEROLD, COUSIN & HEROLD,

Respondents.

No. 771

FRANK FITZGERALD, TRUSTEE FOR MT. FOREST FUR FARMS OF AMERICA, INC., MORAN CORPORATION OF THE SOUTH AND ISAAC S. HELLER,

Petitioners,

v.

ERNEST COCKRELL, SIDNEY L. HEROLD, SUMTER P. COUSIN AND SAMUEL L. HEROLD; AND S. W. PLAUCHE AND S. W. PLAUCHE, JR., COMPOSING THE LAW FIRM OF PLAUCHE & PLAUCHE,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF ON BEHALF OF PETITIONERS

(All italics and bold face type are supplied unless otherwise indicated)

RESPONDENTS ARE NOT IN POSSESSION OF RES IN CONTROVERSY.

The opening paragraph of the respondents' brief, which obviously seeks to summarize their case, is so replete with misleading language as to require a reply by the petitioners. It is stated therein that this is an attempt to require the respondents to litigate in a bankruptcy court in Michigan "the respondents' title to mineral property situated in the State of Louisiana near the Gulf of Mexico, of which the respondents have been in undisturbed, exclusive, open and notorious possession for many years."

Nothing could be further from the fact. Mt. Forest, at the time of the filing of the petition for reorganization,

owned and was in physical possession of the 52,000 acre tract of land involved, together with the minerals contained therein. The use of the phrase "title to mineral property situated in Louisiana" is completely misleading. The most that any of the respondents can have under the *settled and established* law of Louisiana, if they are right in all of their contentions, is simply a servitude upon Mt. Forest's property. Such a servitude is but an intangible, incorporeal right to go upon Mt. Forest's land in search of minerals and to reduce to possession and remove any minerals that may be found therein. None of the respondents have, or can claim to have, title to, or possession of minerals, which are fugitives and subject neither to ownership nor possession, separate and apart from the land of which they form a component part.

Conceding, arguendo, that, for the purpose of a reorganization proceeding under Chapter X of the Bankruptcy Act, possession of property in controversy is the sole test of the jurisdiction of the court over such property, and of its jurisdiction to hear and determine summarily claims and controversies relating thereto, a preliminary step to the determination of such possession, is, necessarily the ascertainment and identification of the property in controversy. Upon this phase of the inquiry, the District Court and the Circuit Court, in the case at bar, have differed, and it is this fundamental difference which essentially occasioned the reversal. The Circuit Court considered the *servitude,* and the District Court considered the *lands containing the minerals,* in respect to which the servitude was reserved, as the property in controversy.

What is the property in controversy?

It should be noted that the fact of the reservation of a servitude in Cockrell is not in dispute. What is actually in dispute, are the interests of the respective parties in the fugitive minerals, that is, whether the servitude, by virtue of the language of the reservation, reserves in Cockrell *one-eighth* of all minerals together with the right to lease said *one-eighth,* or *all* the minerals together with the right to lease *all* the minerals. Thus, the dispute is over the minerals.

The determination of the *fact* of possession is for the bankruptcy court whose possession is challenged. *Taubel-Scott-Kitzmiller Company v. Fox*, 264 U. S. 426 (1924). The District Court found as a *fact* that at the date of the filing of the reorganization petition, the debtor corporation was "in the actual, physical and exclusive possession" of the lands in question, and that the petitioner herein succeeded to such possession. (Findings of Fact—17 to 20, Conclusions of Law I, R. 312-313, 330).

Under the *settled* applicable Louisiana law, as above stated, fugitive minerals are not susceptible of ownership or possession apart from the soil of which they form a component part.

Article 505 of the Civil Code of Louisiana very simply and clearly states: "The ownership of the soil carries with it the ownership of all that is directly above or under it. * * *"

We quote from the leading Louisiana decision of *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922) wherein the Supreme Court of Louisiana stated:

> "When the original opinion was handed down by Mr. Justice O'Neill on January 5, 1920, this court then held for the *ninth* time *that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part,* and that a grant or reservation of such oil and gas carried only the right to extract such minerals from the soil. * * * " (150 La. at p. 856, 91 So. at p. 242.)
>
> "We therefore hold that it is the settled jurisprudence of this state *that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part; and a grant or reservation of such oil and gas carries only the right to extract such minerals from the soil.*" (150 La. at p. 858, 91 So. at p. 243.)

In *Federal Land Bank of New Orleans v. Mulhern,* 180 La. 627; 157 So. 370 (1934), it was said,

> "While the owner of land does not own the fugitive minerals beneath the surface, and they are not susceptible of ownership apart from the land, yet those minerals, while in place in the ground beneath the surface, unsevered, are real estate, a part of the land itself, a part of the realty as much so as timber, coal, iron and salt."

Leading textbook writers on the subject of Louisiana mineral rights have arrived at the same conclusion. In the recent work of *Daggett* on *Louisiana Mineral Rights,* it is stated at page 201:

> "* * * No one would dispute the fact that oil and gas are a part of the realty while in storage within the earth. * * *"

In *Thorton on Oil and Gas*, the rule is thus stated: (Vol. I, p. 72)

> "Oil and gas, until severed from the realty, are as much a part of it as coal or stone. So long as they remain in the ground, outside of an artificial receptacle, at least, as the casing of a well or pipe line, they must be treated as a part of the realty underneath the surface of which they lie."

Thornton's language was adopted verbatim by the Supreme Court of Louisiana in *Rives v. Gulf Refining Co. of Louisiana*, 133 La. 178, 183, 62 So. 623, 625 (1913).

Therefore, of necessity, possession of the land carries with it possession of the unsevered, fugitive minerals "while in place in the ground beneath the surface". This being so, the law of Louisiana is directly in harmony with *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). In the leading case of *Exchange National Bank of Shreveport v. Head*, 155 La. 309, 99 So. 272 (1924), it was definitely held that a bankrupt's possession of the land passed to its Trustee, and that such possession included the minerals contained within the land, since the law of Louisiana recognizes no separate estate in minerals which could be vested in anyone else.

In the case at bar, Mt. Forest has unquestioned possession of the land. The unsevered, fugitive minerals are a component part of the soil and continue as "a part of the land itself" until severed therefrom. It therefore follows that if possession is the test of the bankruptcy court's jurisdiction herein, then the debtor was in possession of the property in controversy at the date of the filing of the reorganization petition. Hence, the Circuit Court

committed reversible error in deciding that the property in controversy was the claimed servitude, and in failing to decide that the land containing the unsevered minerals was the *res* before the court.

RESPONDENTS HAVE NO TITLE AND HENCE NO SERVITUDE AS TO SEVEN-EIGHTHS OF THE MINERALS.

But the misleading character of respondents' opening statement does not cease with a consideration of the problem of possession. Not only is it impossible under Louisiana law to possess fugitive minerals apart from the land of which they form a component part, but it is likewise the *settled* law of Louisiana that a mineral servitude which is called "discontinuous" can be established only by title.* None of the respondents have any title to Mt. Forest's minerals.

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* Art 727 of the Civil Code of Louisiana. Servitudes are either continuous or discontinuous.

Continuous servitudes are those whose use is or may be continual without the act of man.

Such are aqueducts, drains, view and the like.

Discontinuous servitudes are such as need the act of man to be exercised.

Such are the rights of passage, drawing water, pasture and the like.

Art. 766 of the Civil Code of Louisiana. Continuous non-apparent servitudes, and discontinuous servitudes, whether apparent or not, can be established only by a title.

Immemorial possession itself is not sufficient to acquired them.

Immemorial possession is that of which no man living has seen the beginning, and the existence of which he has learned from his elders.

See also:

Goldsmith v. McCoy, 190 La. 320, 182 So. 519 (1938);

Sample v. Whitaker, 171 La. 949, 132 So. 511 (1930);

Ogborn v. Lower Terrebonne Refining & Manufacturing Co., 129 La. 379, 56 So. 323 (1911);

Kohn v. Bellott, 169 La. 352, 125 So. 269 (1929);

Larcade v. Iseringhausen, 153 La. 976, 96 So. 830 (1932).

Not only must a mineral servitude in Louisiana be established by title, but immemorial adverse possession is insufficient to establish such a servitude. This has been clearly stated by *Daggett* in her work on *Louisiana Mineral Rights*, pages 28 and 29:

> *"Acquisition by prescription of a discontinuous servitude whether apparent or not, is illegal. 'Immemorial possession itself is not sufficient to acquire them.' It would appear that a user of a mineral right can never establish title.* * * *"

It therefore follows that the fact that the respondent oil and sulphur companies have been removing oil and sulphur from Mt. Forest's property for a number of years, that they have hundreds of employees working upon Mt. Forest's property, and that they have invested large sums of money in the equipment placed upon Mt. Forest's property, in no way serves to establish a title to a servitude to Mt. Forest's minerals in any of the respondents.

The fact is that Mt. Forest has never granted to any of the respondents a servitude as to its minerals, and none of the respondents can establish a title thereto as required by the Louisiana law. The record is replete with evidence of the repeated attempts of Cockrell, the oil companies, and the sulphur company to obtain some sort of written conveyance from Mt. Forest, but during the entire past ten years Mt. Forest has never given any lease, contract or conveyance or any other instrument to any of the respondents authorizing them to remove Mt. Forest's minerals. (R. II - 582-4; IV - 2311; 1612; 1590; 1693.)

As defined by the Civil Code of Louisiana, *supra*, some examples of discontinuous servitudes are such as the rights of passage, drawing water, pasture, and the like. Under the decision of the Court of Appeals it would follow that the bankruptcy court would not have the right to determine either the existence or the extent of such rights, which some party claimed as a burden upon land to which the bankrupt had uncontroverted title. Petitioners submit that such was not the intention of Congress in its passage of the Chandler Act.

Accordingly, meeting the opposition on their own ground, petitioners submit that the respondents have neither title to nor possession of the minerals contained within the land owned and possessed by Mt. Forest; that under both Louisiana and federal law the District Court in Detroit properly took jurisdiction of the within controversy.

RESPONDENTS HAVE MISINTERPRETED THE SO-CALLED "BONUS" CASE OF MT. FOREST FUR FARMS OF AMERICA, INC. vs. COCKRELL, 179 LA. 795, 155 SO. 228 (1934).

Respondents have argued that the District Court's findings are not entitled to consideration, since it disregarded the decision of the Supreme Court of Louisiana in the so-called "Bonus" case of *Mt. Forest Fur Farms of America, Inc. v. Cockrell*, 179 La. 795, 155 So. 228 (1934). An excerpt from that case is quoted on page 4 of respondents' brief to the effect that Cockrell "unquestionably retained for himself * * * * the perpetual and exclusive right to make and execute mineral leases on all or any portion of the land." This is a correct quotation, and we have no quarrel with it.

However, on page 34 of their brief the respondents draw an entirely unwarranted conclusion therefrom, that this case "settled Cockrell's power to lease all of the mineral rights here in controversy * * *".

Petitioners have never denied that Cockrell had a right to make and execute exclusive leases as to his one-eighth interest in the minerals, but that is a far cry from the incorrect statement that he had a power to lease all of the minerals including Mt. Forest's seven-eighths thereof.

As petitioners have stated in their principal brief, one of the two ultimate issues to be decided on the merits is the extent of Cockrell's power to lease. Most assuredly he could make a lease, but the whole lawsuit hinges about the simple question, "What minerals could he lease?" This question was not before the court and was not decided in the *Mt. Forest-Cockrell* case above cited, as is clearly shown by the excerpt quoted in respondents' brief.

The so-called "Bonus" suit was tried upon pleadings alone, the defendant having filed the equivalent of a common law demurer. The only point involved was whether Cockrell was entitled to keep the bonus that he had received for the lease made by him to Gulf in March, 1928. That was the sole issue submitted and the sole point decided in that case.

THERE IS NO HARDSHIP UPON ANY OF THE RESPONDENTS IN THIS PROCEEDING.

Respondents argue that it was never intended by Congress that there should be such a hardship imposed upon

them as the Trustee here seeks, viz., requiring them to come to Detroit, a thousand miles from Louisiana, to try the title to property located in Louisiana.

Petitioners believe that this Court is interested in a realistic approach to this so-called "hardship". As shown by the record, Cockrell has already received over One and a Half Million Dollars in royalties from minerals removed from Mt. Forests' property. (R. IV-1622, 2113) The respondent oil and sulphur companies, as shown by the record, have already removed over Twenty-five Million Dollars worth of oil and sulphur from Mt. Forest's property. (R. IV-1621, 2138) The oil and sulphur companies, as shown by the record, have a combined worth of over Six Hundred Million Dollars. (R. IV-2125-28) Mt. Forest is in reorganization. We submit that it is obvious that from a pragmatic point of view the real hardship has for ten years been placed upon the shoulders of Mt. Forest, crippled because of lack of funds and capital, in its attempts to obtain what is rightfully due it from the respondents.

Moreover, this very point was considered by Congress in the drafting of the Chandler Act. In the colloquy between Honorable Walter Chandler, Representative in Congress from the State of Tennessee, and Mr. Jacob I. Weinstein, a member of the National Bankruptcy Conference, and Chairman of its Committee for the drafting of the Chandler Act, referred to on pp. 29 and 30 of petitioners' brief in support of certiorari (Hearing before Committee on Judiciary, Seventy-fifth Congress, First Session, H. R. 8046, pp. 241 and 242), a letter was introduced in the record from a complaining attorney in Longview, Texas.

We quote a few short paragraphs from that letter:

> "We want to call to your attention what is happening under the new bankruptcy act, known as section 77B.
>
> "If you will refer to *Ex Parte Baldwin* (219 U.S. 610, 78 L. Ed. 1920) and *Chandler v. Perry* (74 Fed. (2d) 371), they will give you some idea.
>
> "We have several instances now where citizens of Texas have been ordered to Detroit, St. Louis, and other points to contest the title of real estate in the bankruptcy courts—this real estate being situated in Texas and controlled only by the laws of Texas, and, of course, desire to have litigation, if any there is, in regard to their property where the courts are acquainted with the rules of property and the holding of the courts with reference thereto.
>
> "It seems to us unfair that they can force a citizen of Texas who owns his property to come to Detroit, to St. Louis, or to Maine to contest the title to his property with some defunct corporation or some bankrupt individual who really has no substantial claim or right to the property. It certainly is confiscation, so far as the ordinary individual is concerned."

The answer made thereto by Mr. Chandler was:

> "I think it is better to adhere to your (Mr. Weinstein) suggestion in the bill than to go back to the old idea of ancillary receivers and litigations throughout the country."

And Mr. Weinstein (who appears herein as one of the attorneys for the petitioners) answered thus:

"The conference has considered this suggestion, but finds that it is impracticable to remove from the jurisdiction of the bankruptcy court the right to litigate claims against property of which the court has control. It is inconvenient, of course, but it is no different in the case of a creditor who resides in California and has a claim against a company that has gone into bankruptcy, we will say, in the southern district of New York. That is just one of those inconveniences with which litigants must put up."

THE LITIGATION PENDING IN LOUISIANA

Respondents have also made much of the fact that there is a suit pending presently in Louisiana, wherein Mt Forest is the complainant and the respondents are the defendants. But throughout their brief respondents fail to make mention of the fact that all the oil and sulphur companies objected and excepted to the jurisdiction of that court until long after the Trustee had filed his petition for relief against the respondents in the bankruptcy court in Detroit.

As stated in our original brief, the corporate respondents are once again exhibiting their constant preference for trying this litigation in some other court than that in which they find themselves at the present time. The issues between the parties are clearly drawn. We submit that if there ever was a case which required the exercise of jurisdiction by the reorganization court, this is one, and failure of this Court to grant certiorari will

impose hardships upon the trustee and the 3,500 shareholders and creditors, whom he represents, which may well prove insurmountable.

Respectfully submitted,

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